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IN THE

Supreme Court of the United States

OCTOBER TERM, 1950

No. 450

T. A. GARRETT AND ELIZABETH GARRETT,
PETITIONERS,

versus

JOHN C. FAUST AND CORA FAUST,
RESPONDENTS.

MOTION FOR REHEARING

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LODOVIC PRINTING CO., SAN ANTONIO, TEXAS

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INTRODUCTORY STATEMENT

It is apparent that the Court of Appeals believed the statement pertaining to cancellation of poult orders made by the Fausts' counsel in his address to the jury in the United States District Court. But the Fausts' own books of account prove the above statements to be indisputably false. Therefore the Court of Appeals never had the power to re-examine the verdict of the jury.

The following are syllabi taken from the case of *Slocum v. New York Life Ins. Co.*, 228 U. S. 364, 1913.

"Mr. Justice Van Deventer:

"The power of a Federal court to re-examine issue of fact tried by a jury must under the Seventh Amendment be tested by the rules of common law."

"Under the rules of the common law an appellate court may set aside a verdict for error of law in the proceedings and order a new trial *but it may not itself determine the issue of fact.*"

See the many cases to that effect in the petition for certiorari and supporting brief.

The following was taken from the jury address of Mr. O'Brien, attorney for the defendants. See pages 255a, 256a.

> " * * * on February 21, Mr. Faust, or the Ephrata Hatcheries sent a telegram to all of the *Texas turkey flocks*, that is, all suppliers, not *Garretts*, but to *everybody*, and the telegram is in evidence, and you will read it, it is dated February 21, in which he says: 'Due to conditions beyond our control, cancellations by the thousands, I cannot take any more eggs this season. Stop all egg shipments at once.'"
>
> " * * * If you please, these are two order books of the Ephrata Hatcheries. They contain *all* of the orders for poults, not turkey eggs, for poults * * * "
>
> " * * * you will find out that when Mr. Faust on behalf of Ephrata Hatcheries sent the telegram of February 21 he had received, as shown by these books, cancellations for 107,134. Cancellations for 107,134 poults *up until February* * * * So that there was *no misrepresentation* when this telegram was sent, it was the truth * * * "

But, as will be shown, it was not the truth.

Faust's February 21st telegram to all the Texas "turkey flock" could mean only one thing to the plaintiffs—that the Fausts were in a very serious financial situation verging on bankruptcy, which was not true. The Fausts' books of account, Exhibits 9, 10, and 11, which were offered in evidence and which were referred to by Mr. O'Brien in his argument tell a very different story. Exhibit 9 gives the list of all the egg sellers, number of eggs purchased by Faust (783,162) and date when purchased—during the turkey year 1945-'46, not only those purchased from the Garretts but from every single seller of eggs to the Fausts for that turkey year. Exhibits 10 and 11 are two books of account in which the Fausts kept complete accounts of the poult sales. Mr. O'Brien, the Fausts' attorney, did not object to the introduction of plaintiffs' Exhibits 9, 10, and 11, the Fausts' only account books for the 1945-'46 turkey season. 67a-73a.

The plaintiffs, before the case was tried, filed a motion requiring the Fausts to produce for inspection, copying, or photostating all of their books of account for the 1945-'46 turkey season covering as Fausts say, December, 1945 to July 1, 1946. The motion was granted by the United States District Court judge. Counsel for plaintiffs made the inspection and decided to have said record photostated at Lancaster, Pennsylvania.

Mr. O'Brien, in his address to the jury, 225a, said:

> " * * * If you please, there are two order books of the Ephrata Hatcheries. They contain all of the orders for poults, not turkey eggs, for poults, and if you will take time you will see it is written in lead pencil in an informal way on page after page; Cancelled, cancelled, cancelled.
>
> In other words, on February 21, if you have the time, and the industry, and the willingness, if you

> count up all those cancellations of poults, *as I have*, you will find out that when Mr. Faust on behalf of Ephrata Hatcheries sent the telegram of February 21 he had received, as shown by these books, cancellations for 107,134 poults." However the books do not show that.

In the foregoing Mr. O'Brien, counsel for defendants, says that the Ephrata Hatcheries books of account are accurate and reliable. He specifically told the jury that the "two order books of the Ephrata Hatcheries * * * contain *all the orders for poults*, not turkey eggs, for poults". The order books to which he refers show only 2,460 poults cancelled. However Mr. O'Brien told the jury that there were 107,134 poults cancelled, as he put it in one sentence, before February and in a later sentence before February 21st. The actual number of poults *sold* by the Fausts from the beginning of the season until February 21, as recorded in the book of account to which Mr. O'Brien refers, was 35,323 and, as the book also shows, only 2,460 poults were *cancelled* during that period. With O'Brien vouching for the accuracy of the books of account and all three of the original books having been admitted in evidence without any objection on the part of the defense attorney; with the record of the poult sales between the beginning of the season up to February 21 covering only 13 pages, no page containing more than 5 sales; with the total number of poult sales being only 57, not counting cancellations of which there were five up to February 21, 1946, Mr. O'Brien would have the Court believe that there were 107,134 poults cancelled! Did not Fausts' books of account impose a definite duty upon the jury to disregard entirely his statement that there were 107,134 poults cancelled? There was no alternative and the jury rendered its verdict accordingly.

Where, as in this case, the attorney for the defendants admits the accuracy of the books of account in addressing the jury and in the presence of the defendants, the jury, of course, has no alternative but to follow those books of account and give its judgment in favor of the plaintiffs. That presents no question of law but only one of facts. Thus the Court of Appeals never acquired jurisdiction to re-examine the verdict of the jury in this case.

LIST OF ALL CANCELLATIONS OF POULT ORDERS DURING DECEMBER, 1945, JANUARY AND FEBRUARY TO THE 21ST, 1946, AS RECORDED IN THE FAUSTS' BOOKS OF ACCOUNT, EXHIBITS 10 & 11.

Note:—The word "Out" is to be found in every sale of a group of poults. That means that a sale has been made and the poults shipped to the purchaser. "Out" does not mean cancelled.

DECEMBER		No. of Cancellations
DATE		
Dec. 17	One cancellation on the first page of Exhibit 10. (Page numbers in defendants' books of account, Exhibits 10 and 11, are either in the upper right or left corner.) Purchaser kept a part and cancelled the balance. The following is an exact copy of this order:—	
	"2698. Edward Wulff. R. #1 Ellicottville, N. Y. Cattaraugus Co.	
	100 Narrangansetts $ 70.00	
	50 Our Choice 30.00	
	$100.00	
	Refunded $40.00 12/17/45 40.00	
	$ 60.00"	

	No. of Cancellations
"Cancelled" was written in pencil in large script across the whole order. The word "Refunded" and the amount and date were written in pen in different handwriting. Apparently that notation was made by a different person after the order was taken. It is also apparent that the order was not completely cancelled. The total number ordered was 150 poults. The Fausts kept $60 of the amount paid in. The cancellation in this case does not cover the whole order of 150 because the poults sold by Faust were different breeds at a different price. Probably not more than a third of the order was cancelled or about 50 poults.....	50
JANUARY	
No cancellations	-0-

It will be noticed that in his address to the jury Mr. O'Brien says that there were cancellations of 107,134 poults before February, 1946—quite a contrast between his figures and those of the Fausts in their books of account—only 50 poults cancelled before February 1. In the same address Mr. O'Brien later says that there were 107,134 poults ordered cancelled before February 21, the date of the telegram of Faust which said:

> "Due to conditions beyond our control, cancellations by the thousands, I cannot take any more eggs this season. *Stop all egg shipments at once.*"

FEBRUARY

DATE		No. of Cancellations
Feb. 4	First poult order in February marked "Cancelled" is in fact not a cancellation (page 7, Exhibit 10). This was first penciled as a cancellation and then below in same handwriting is written "Will take after phone conversation". Then underlined is the word "Deliver" with no mention of a refund of the $1750.00 for the 2500 poults marked "Paid". This was headed "Forest Hall Farms" and dated February 4. As you can see, this is not a bona fide cancellation	-0-
" "	Cancellation of 35 poults with all the money refunded	35
" "	Cancellation of 125 pounts, the money being refunded	125
" "	(Page 11) cancelled sale of 1500 poults purchased by Howard Martin. The following is a copy:— "2675 Howard Martin R #2 Lancaster, Pa. 1500 B. B. B. $1125.00 Cancelled Will Call (Pk Millersville 4976)"	
" 18	(Page 13) Exact copy of the same order with the same number— 2675. It is petitioners' judgment that these two orders are one and the same, the latter being merely a repetition of the first.....	1500

DATE		No. of Cancellations
Feb. 18	Order marked "Cancelled" of 750 poults with the notation "See order Blank" underneath.....	750
	Total February Cancellations....	2410
	Total cancellations for December & January	50
	Total cancellations for December, January & to Feb. 21....	2460

An examination of respondents' Exhibit 9 shows that Fausts' first principal sources of eggs were the Texas turkey egg producers. This is evidenced by the fact that on each page of that exhibit there were usually two and sometimes three accounts. With no exceptions, where there were more than one, the first would be that of a Texas egg seller. The dates are given and these also show that Texans were the first sellers of eggs to Ephrata Hatcheries. During the 1945-'46 turkey egg season there were 16 states represented by turkey egg sellers. Of these 54 were from Texas and 14 from other states. As in every business, there were slight variations of prices during the year. A one cent turkey egg price drop on 100,000 eggs means a profit to the buyer of $1000.00 if he is not bound by season contracts like the Garretts and the rest of the "Texas Turkey Flock".

The total number of eggs purchased by Faust before February 21, 1946 was 309,590 and the total number purchased by him after February 21 to the end of the season was 473,572, totaling 783,162 for the season. The average price which the Fausts received for poults was 70¢, 10¢ above the minimum price put into the letter contract by Faust himself for the season. The gross income, as the books of account show, was $287,806.40 for the year. The

Faust's telegram, in its wording, was a command to "stop all egg shipments at once". It was sent ostensibly to all shippers but in fact only to the Texas sellers to whom Faust had given whole season price contracts. Faust used this telegram scare to make the Texans acquiesce in the cancellation of their contracts. Thus there was no issue of law before the Court of Appeals. The issue of fact had been decided by the jury.

production curve for a seasonable business being transacted in a part of the year. Certainly, if there had been a financial crisis such as Faust and his lawyer and the Court of Appeals have pictured it would be reflected in that production. Also the fact that the prices for poults averaged 70¢, 10¢ above the figures in Faust's letter contract accepted by the Garretts, is clear proof that there was no financial crisis which Faust was obliged to bridge over. Is it not true that the very first factor which an appraiser wants to see and examine is the income as shown in the books of account from month to month? Merely looking at the cancellation losses and ignoring the season's over all profits would not satisfy such an appraiser, as apparently it did the Court of Appeals in the case at bar.

An examination of Exhibit 9, Faust's own book of account, shows that between February 10 and March 1, 1946 Faust purchased 132,670 eggs and on February 20 and 21, the two days when he was preparing and sending out telegrams and letters to Garrett and the Texas producers, telling them to stop egg shipments at once he bought 24,824 eggs. At no time did Faust decrease the daily buying of eggs after February 21. Faust's book of account, Exhibit 9, says that he purchased 309,590 eggs before February 1, 1946, and from February 21 to the end of the season he bought 473,572, 163,982 more after February 21 than before. Thus even though the number of eggs sold by the Texas producers after February 21 was greatly reduced, nevertheless, the purchase of eggs by Faust was greatly increased. This was brought about by a tremendous increase in the months nearest February 21—

number of poults sold by the Fausts during the year was 411,152.

On page 8 in Appellees' Motion for Rehearing in the Court of Appeals is to be found a list of the poults sold by the Fausts in the 1945-46 season. It shows a perfect production curve for a seasonable business being transacted in a part of the year. Certainly, if there had been a financial crisis such as Faust and his lawyer and the Court of Appeals have pictured it would be reflected in that production. Also the fact that the prices for poults averaged 70¢, 10¢ above the figures in Faust's letter contract accepted by the Garretts, is clear proof that there was no financial crisis which Faust was obliged to bridge over. Is it not true that the very first factor which an appraiser wants to see and examine is the income as shown in the books of account from month to month? Merely looking at the cancellation losses and ignoring the season's over all profits would not satisfy such an appraiser, as apparently it did the Court of Appeals in the case at bar.

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March, April, and May. This is also evidenced by the great increase in the sale of poults by the Fausts in those three months. That means that it was necessary to buy more eggs.

Faust's books of account, Exhibits 10 and 11, show the following poult sales for the five months beginning with February: February—23,505, March—65,711, April —131,771, May—103,833, and June—46,295, or a total of 370,115. Faust sold these at an average price of 70¢ per poult, bringing in a gross income for those five months of $259,080.50.

Mr. O'Brien says these books of account are accurate. At no time have the Fausts dared to say that these figures are mistakes nor did they try to disprove them in the trial of the case or make some excuse for alleged errors. With the jury having no denials before them from the defendants, what was its duty in determining a verdict other than the one it brought in?

Here again, where is there any issue of law which gave the Court of Appeals the right to re-examine the jury's verdict in the face of the 7th Amendment of the Constitution of the United States?

The Court of Appeals, like the defendants and their attorney, did not go any farther into the case than February 21, 1946, the date of Faust's telegram:—"Due to conditions beyond our control, cancellations by the thousands, I cannot take any more eggs this season. Stop all egg shipments at once." On page 6 of its opinion the Court said:

> "Nor is there any evidence that in December, 1945 and January and February 1946 the prospects of the Ephrata Hatcheries for the sale of poults were not as represented in the statements referred to. On the contrary the defendants' books of account which were offered in evidence by the plaintiffs establish that they had in fact received can-

cellations of orders for thousands of poults during this period."

The three books of account mentioned all are evidence admitted by O'Brien. Yet the Court of Appeals failed completely to pay any attention whatsoever to these books except that they saw some cancellations for the first three months, and assumed that the 107,134 poult cancellations mentioned by O'Brien were figures quoted directly from the books of account.

The record of what took place is on the first 14 pages of Exhibit 10, the first account book registering the sale of poults, and all that happened up to February 21 was on these 14 pages. There were never more than five sales on each page. Petitioners are at a loss to know how the Court of Appeals could make the statement on page 6 of its opinion that "the books of account which were offered in evidence by plaintiffs establish that they had in fact received cancellations of orders for thousands of poults during this period" if, as the Court said, it had "made a careful study of the record", that is, of the first 14 pages in Exhibit 10 which contain that record.

On page 5 of the Court of Appeals opinion there is a quotation from Faust's letter of February 21 to N. B. Garrett, son of T. A. Garrett, petitioner, in which he said "Each day we receive cancellations of poults." This comes within the period prior to February 21. Exhibit 10, Faust's own account book, shows that up to that time there had been only five cancellations. If the Court studied that account book how could it believe the falsehood in the N. B. Garrett letter?

Petitioners also fail to see how the Court could pass upon the financial condition of any company merely by counting its losses. Does that not amount to ignoring the most relevant and material evidence, the equitable assets

of the Garretts shown in the three volumes of account, thus denying the Garretts the due process of law guaranteed to them by the Constitution of the United States?

Mr. O'Brien, in his address to the jury, said "The books of account contain all the orders for poults, not turkey eggs, for poults". The jury, under their oath as jurors, could not bring in any other verdict on the issue of fact than the one they handed down, and which they alone had the power to decide.

The Court of Appeals ignored the fact that the Fausts collected twice for the same broken eggs, once from the Garretts and once from the Railway Express Agency. See Appellees' Motion for Rehearing in the Court of Appeals, pp. 15-18 inclusive.

The Fausts, through their attorney, were guilty of contempt of court when they designedly caused the false statement to be put before the jury in the District Court and before the Court of Appeals "that there were 107,134 cancellations before February 1, 1946" and further said that the February 21st telegram to the Garretts was true when they knew it to be false and failed to make any corrections when the case went up to this Honorable Supreme Court in the Petition for Certiorari.

Thus Contempt of Court has extended within the jurisdiction of this Honorable Court. If the parties who put the false statement of facts into the record did get past the Court of Appeals they are not beyond the bounds of justice.

False facts are untruths. Untruths have no existence and therefore can not be the basis of any legal rights. Thus it follows that the false statement made by O'Brien that there were "cancellations for 107,134 poults up until February" makes the judgment of the Court of Appeals non-existent, void and not voidable.

The opinion of the Court of Appeals is interpenetrated by the Fausts' false claim of cancellations by the thousands

between December 15 and February 21. It bases its decision that there was no misrepresentation on the said thousands of cancellations. The following is a sample of the Court's reasoning, taken from page 6 of its opinion:—

> " * * * Nor is there any evidence that in December 1945 and January and February 1946 the prospects of the Ephrata Hatcheries for the sale of poults were not as represented in the statements referred to. On the contrary the defendants' books of account which were offered in evidence by the plaintiffs establish that they had in fact received cancellations of orders for thousands of poults during this period."

That claim is absolutely disproven by Faust's own books of account vouched for as complete authority by his attorney, Mr. O'Brien. Therefore the decision of the Court of Appeals based upon these false statements is void because the appeal from the District Court to the Court of Appeals presents no issue of law, only an issue of fact which the District Court jury decided and which verdict, protected by the 7th Amendment of the United States Constitution, cannot be re-examined. See the many cases cited in plaintiffs' Petition for Writ of Certiorari.

Inasmuch as the Fausts' defense is based entirely upon facts which they knew to be false and which misled the Court of Appeals they are guilty of contempt of Court. When the real truth is known there was no real controversy because O'Brien says that Exhibit 10 states the truth. The Fausts having created a defense out of false facts first tended "to bring the authority of the courts and the administration of law into disrepute or in some manner impede the due administration of justice" and impaired plaintiffs' "remedies and rights causing actual damages" to plaintiffs with "no remedy prescribed by law for the

recoupment of such damages" if this Honorable Supreme Court does not take jurisdiction. 17 *C. J. S.* 4.

> "Four elements are necessary to hold one guilty of contempt of court in procuring mandates impairing and impeding plaintiff's rights and remedies and causing him actual injury, etc., namely: First, a deceit on the court; second, the plaintiff's remedies and rights were impaired, impeded, or prejudiced; third, that the actual loss, or damages were caused to plaintiffs; and, fourth, that he has no remedy prescribed by law for the recoupment of such damages.—Advance Piece Dye Works v. Zeller, 270 N.Y.S. 487, 150 Misc. 908. 13 C.J. 18, note 50a."

Footnote to 17 *C.J.S.* 4

> "'Obtaining the opinion of the court where no real controversy exists, * * *' citing U.S.—Chamberlain v. Cleveland, Wis. 1 Black 419, 17 L. Ed 93 L. Ed 23, Lord v. Veazle, Me., 8 How., 251 12 L. Ed. 1067."
> 17 *C. J. S.* 12.

The United States District Court jury having found for the plaintiffs on the question of facts involved and there being no question of law, by virtue of the 7th Amendment of the Constitution of the United States, the Court of Appeals had no jurisdiction in this case.

Respectfully submitted,

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I hereby certify that one copy of the foregoing motion for rehearing has been mailed to the attorney for the appellants.

.....

To:
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CERTIFICATE OF COUNSEL

I, Attorney for the above-named petitioners, do hereby certify that the foregoing motion for rehearing of this cause is presented in good faith and not for delay.

.....